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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1165

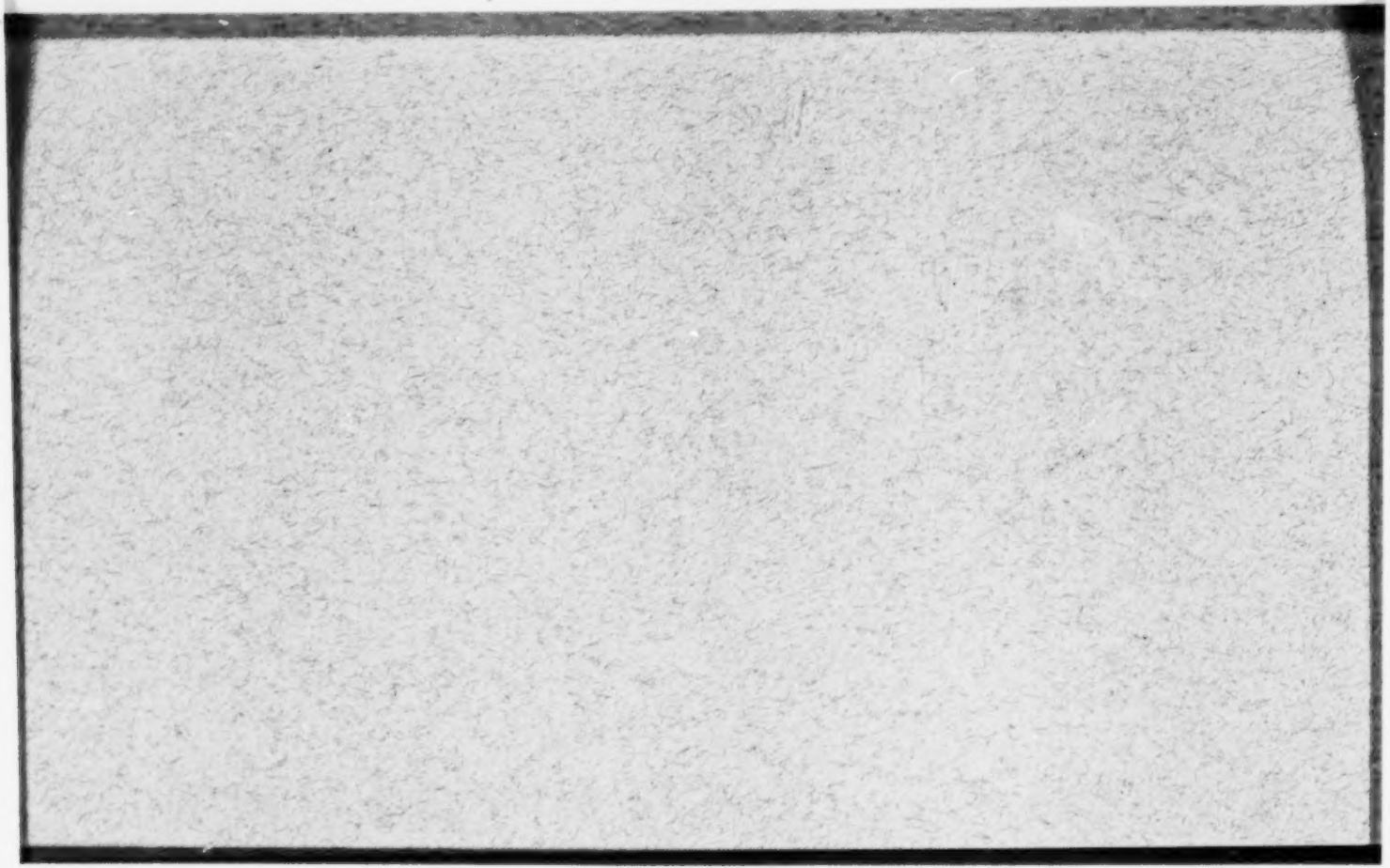
JOSEPH E. SHENKO AND RUTH A. SHENKO, ADMINISTRATORS OF THE ESTATE OF JOSEPH E. SHENKO, JR., A MINOR, DECEASED, *Petitioners*,

vs.

JACK COLE TRANSPORTATION CO.,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

B. NATHANIEL RICHTER,
Counsel for Petitioners.



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SUPREME COURT OF THE UNITED STATES

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No. 1165

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vs.

JACK COLE TRANSPORTATION CO.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Joseph E. Shenko, and Ruth A. Shenko, Administrators of the Estate of Joseph E. Shenko, Jr., Deceased, respectfully petition that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in this case on February 14th, 1945.

A

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on February 14th, 1945 (R. 136). The jurisdiction of this Court is involved under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Sec. 347(a).

B

Statement of the Matter Involved

This case comes before this Court from the Third Circuit Court of Appeals 147 F. (2d) 133 (1945).

It involves a suit for damages instituted under the provisions of the Pennsylvania Survival of Action Statutes P. L. 2755 (1937), 20 P. S. 321, Note 772, and Act of 1855 P. L. 309, 12 P. S. 1602, as amended, and Pa. R. C. P. 2202, by the parents of Joseph E. Shenko, Jr., deceased, aged six years, as Administrators of his Estate, for his death, caused by being allegedly negligently run down by a truck and trailer of the defendant Jack Cole Transportation Co.

The jury returned a verdict for the defendant. The petitioners had contended that the child had walked into the public highway at the public crossing and while standing there in full view, was run down by a truck and trailer of the respondent which had come to the intersection and made a sharp left-hand turn into the wrong side of the street. In support of the petitioners' position, there was proof of the blood marks indisputably establishing the exact point of contact at the public crossing. In addition, the petitioners called several witnesses, who traced the child progressively along the sidewalk to the corner. Another witness related in complete detail how the child walked into the street at the crossing, turned and stopped,

and how the truck thereafter came to the corner, made a left turn and struck the child with the front bumper. In addition, the petitioners traced the course of the truck to the intersection, indicating haste and impatience on the part of the driver and the traffic confusion present at the corner, resulting in the wrongful turn made by the truck.

In its pleadings the respondent denied all knowledge of the accident. Pressed by the overwhelming weight of the record, at the close of the petitioners' case, in support of the petitioners' contention, the respondent shifted its defense from a complete denial of the occurrence of the accident, to an affirmative defense, that sought to establish that the child came to the corner *after* the truck started to make the turn and ran into the extreme left-rear of the truck, beyond the last wheel of the trailer.

The respondent could call no eye-witnesses to establish this defense. It merely called an Officer, who was permitted over the petitioners' repeated objections to express the opinion that certain marks at the extreme left-rear of the trailer were fingermarks made by a small child. There was absolutely no proof introduced then or later in the trial that these marks were:

(a) fingerprints at all, or

(b) made by the deceased, or

(c) made before the accident, at the time of the accident, or in the two hour interim between the accident and the time the Officer inspected the truck.

The respondent offered absolutely nothing but this testimony to support this, its sole defense offered in this case. Furthermore, upon the objection of the petitioners to the Officer's testimony, the Judge did not himself preliminarily decide its admissibility and relevancy, but passed that issue to the jury.

On appeal, the Circuit Court of Appeals implicitly conceded that this testimony was improperly admitted, but affirmed on the grounds that though the petitioners had objected to the Officer's testimony, the petitioners had failed to *move to strike out* the testimony in question and had not objected to the admission into evidence of the *photographs.*

The Circuit Court also ignored and failed to pass upon the complaint of the petitioners, that the trial Judge had not exercised his absolute judicial obligation and function of preliminarily, himself, ruling on the admissibility of evidence instead of passing that duty to the jury.

C.

Questions Presented

1. Whether under Rule 46, of the new Federal Rules of Civil Procedure, a party objecting to testimony is obliged to do more than make an objection. Is he also obliged to move to strike out testimony admitted over objection in order to protect his position as to its admissibility?

2. Whether under Rule 43 favoring admissibility of evidence, the rules of evidence governing relevancy may be gainsayed in Federal trial practice?

3. Whether under present Federal trial practice, a trial Judge is no longer obliged to pass preliminarily on the question of admissibility of evidence, before permitting the jury to consider its probative value?

4. Whether in the transition in the law towards speedy, efficient trials it is no longer prejudicial error to admit evidence having neither probative value nor preliminary relevance to the only issue raised by its proferror, especially where that party offers no other evidence in support of that fact?

D

Reasons Relied On for Allowance of Writ

The United States Circuit Court of Appeals for the Third Circuit has for the first time since the new Rules of Federal Procedure have been adopted, laid down the principle, that:

(*a*) It is not enough to object to testimony offered at trial, but that in addition, it is necessary to move to strike out such testimony after it is admitted over objection,

(*b*) The United States Circuit Court of Appeals for the Third Circuit, has inferentially (by failing to consider the point in its opinion), ruled that a trial Judge may pass the *judicial* function of passing preliminarily on the admissibility of testimony to the jury,

(*c*) The United States Circuit Court of Appeals has decided that it is not prejudicial error to admit totally irrelevant testimony to establish a party's main and sole contention, even though there is nothing else in the whole record otherwise supporting that contention,

(*d*) As the problems here raised, occur in every single trial in the United States Courts, it is of primordial importance that this Court define the necessary procedure to be followed in trial practice in protecting the record of a case and to establish a test for determining prejudicial error.

A supporting brief accompanies this petition.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to review the order of the United States Circuit Court for the Third Circuit, entered by that Court

in this case on February 14th, 1945, and that the said order be reversed by this Honorable Court, and that your petitioners may have such other and further relief as this Honorable Court may deem proper.

Respectfully Submitted,

B. NATHANIEL RICHTER,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1165

JOSEPH E. SHENKO AND RUTH A. SHENKO, ADMINISTRATORS OF THE ESTATE OF JOSEPH E. SHENKO, JR., A MINOR, DECEASED, *Petitioners,*

vs.

JACK COLE TRANSPORTATION CO., *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of the Courts Below

The opinion of the United States Circuit Court of Appeals, Third Circuit, (R. 133) is reported in 147 F. (2d). The District Court of the United States for the Eastern District of Pennsylvania did not deliver a written opinion.

II

Jurisdiction

The jurisdiction of this case is invoked under Sec. 240(a) of the Judicial Code, as amended, 28 U. S. C. A., Sec. 347(a). The judgment of the United States Circuit Court of Appeals, Third Circuit, to be reviewed was entered on February 14th, 1945 and is reported at 147 F. (2) 133.

III

Statement of the Case

A statement of the case appears under heading "B" of the Petition for Writ of Certiorari. In the interest of brevity, that statement is not now repeated, but is referred to with the request that it be considered as here incorporated, by reference.

IV

Questions Presented

The questions specifically brought forward by the Petition for Writ of Certiorari appear under heading "C" of the petition. Again, in the interest of brevity, they are not now repeated, but are referred to with the request that they be considered as here incorporated by reference.

V

ARGUMENT

Summary of Argument

1. The evidence of marks on the side of the truck was improperly admitted, since no logical basis of its relevancy was established, connecting the deceased with the marks, or affording reasonable ground for the jury conclusion that the decedent ran into the rear of the turning truck.

2. There was no duty on petitioners to move to strike out testimony improperly admitted over objection specifically indicating ground of objection in compliance with Rule 46.

3. The error in admitting evidence of these marks without some proof connecting the decedent with them, was

prejudicial error, especially since there was no other evidence supporting this sole defense raised by respondent.

4. The trial Judge avoided his inescapable obligation of preliminarily deciding the relevancy of these marks and improperly shunted that judicial function to the jury.

I. The Evidence of the Marks Was Improperly Admitted

The petitioners presented the case on the theory that respondent's truck had run down a child in clear view on the highway, at the pedestrian crosswalk. To do so was clearly negligence under Pennsylvania law.

The petitioners further showed that the respondent's driver had:

(1) manifested impatience at being delayed by a city ash wagon,

(2) finally passed it, reached the intersection and was met by trolley approaching head-on, which turned left at the intersection, resulting in a blockage there, necessitating a sharp left turn by the truck to avoid impact with the trolley,

(3) that this emergency of the truck driver's own making explained why, if true, the driver never saw the child in the crosswalk, and

(4) that as the bloodmarks indisputably established the point of impact, the truck must have been on the wrong side of the street in violation of the Pennsylvania Motor Vehicle Code, Act of 1929, May 1, P. L. 905 S. Sec. 1011, as amended, 75 P. S. 546.

Although the respondent, in its answer had pleaded no knowledge of the accident at all, the state of the record at the close of the petitioners' case presented so overwhelming a probability of a verdict for the petitioners, that the re-

spondent shifted its defense from complete denial of the occurrence to asserting that the decedent ran from the sidewalk into the extreme left-rear of the trailer, *after* the truck began to make a left turn at the intersection.

The respondent had no eyewitnesses to uphold this contention. It called one TUCKER, who was a half-block away from the truck as it turned, and he testified only that he did not see the front of the truck strike the child. This was negative testimony. *He also said he did not see the child run into the side of the truck*, nor indeed did he see the child at any time until after the truck had left the scene of the accident.

The whole case turned then on whether the front of the truck struck the child or the child ran into the extreme left rear of the trailer.

The only evidence offered by respondent in support of its contention was that of Officer HOMMELL. Over petitioners' objection, he was permitted to testify that he found marks of a small child at the extreme left rear of the trailer four feet above the ground; the inference intended to be drawn was that they were those of the decedent. However, these marks were to the extreme rear of the truck *beyond* the last wheel of the forward moving vehicle. The coroner's finding however of crushed chest, pelvis and legs conclusively established that the decedent was run over by one or more wheels. *It would have been physically impossible for the child to* have been crushed by any one or more of the wheels and yet have also *later* made these marks on the side of the truck, beyond all the wheels, especially at that height on the truck.

There was absolutely no proof:

(a) that these were the finger prints of the decedent,

(b) that they were finger prints at all,

(c) that they were not on the truck before the accident,

(d) that they did not get on the truck in the two-hour interim between the accident and the time HOMMELL found them,

(e) or, that the decedent was ever seen in an upright position any place near the point on the trailer where the marks were found.

Nothing was offered to connect these marks with the decedent. No other evidence of this only issue in the case was offered.

The petitioners duly objected and stated their reason in full compliance with Rule 46. The petitioners repeated their objections.

The Circuit Court in an opinion without a single citation, sustained the jury verdict for the respondent and dismissed petitioners' argument that the trial Judge prejudicially erred in admitting these marks on the following grounds:

(a) The respondent had offered several photographs of the truck and trailer in evidence without objection; that since the petitioners did not object to the photographs, it was too late to object to the Officer testifying as to what he saw on the truck since the photographs contained these same marks. Actually the petitioners had no idea that the pictures contained such marks or that they were being offered to establish the marks in evidence. They are microscopically to be seen only if one's attention is directed to them. Petitioner failed to object to the photographs only because they were offered generally and without any reference to the virtually indiscernable marks in the photographs *later* stressed by respondent. Just as the respondent could not have objected to the petitioner's offer of pictures of the intersection to give a general view of the locus of the accident, so the petitioners could not object to a general pic-

ture of the respondent's truck, unless the respondent had specifically indicated the marks and expressed the intended purpose to which the pictures were to be later put.

(b) That the petitioners had permitted the witness to answer the following questions without objection:

> "Q. What kind of a truck was it?
> A. It was a International Tractor and a Freuhauf trailer.
> Q. Did you examine it?
> A. Yes I did.
> Q. Did you find any marks on it?
> A. The only marks I could observe was on the left rear end.
> Q. What were they?
> A. Well, they appeared to be finger marks, and also * * *."

At this point the Court below held that following objection as it appears upon the printed p[illegible](a) came too late:

> "Mr. Richter: That is objected to, if Your Honor please. No connection whatever between that testimony and this deceased."

Not until an objectionable question is asked can one object. If the Officer could say he found this child's glove there, or identified finger prints, or blood marks of this decedent on some part of the truck, it would have been perfectly proper to admit it. Captious objections only hurt the objector's case. Not until the petitioners did object was there legal cause to do so. Actually the witness was answering the question as petitioners' counsel was simultaneous raising his objection. The witness merely stopped talking where the record indicates and the stenographer noted what both said.

The Court below, however, held that the petitioners objected too late and that the door was then opened for the whole line of examination. It is submitted that this was error.

(c) Seemingly recognizing that the two above-mentioned alleged oversights as to timely objection by the petitioners were not adequate to sustain the admission of this highly improper evidence, the learned Court below then rested its major justification therefor on the ground that the petitioners had not moved to strike out this testimony. If it was too late to object could petitioners move now to strike?

For those who wish to protect a record where testimony has been admitted over objection, the lower Court has now superimposed an additional requirement. It is necessary apparently to move to strike such testimony after admission. By Rule 46 it was intended that exceptions, sealed bills of exceptions and all other technicalities heretofore required to protect the record from judicial error in rules of evidence be discarded. Efficiency and simplicity dictated the new rule providing that an objection was all that was necessary to reserve the question of law involved for Appellate consideration, as long as the objector indicated the ground for his objection revealing to the trial Judge thereby the legal basis for the objection.

If this decision stands, then in each of the hundreds of cases tried daily in the United States District Courts, *every* lawyer will have to move to strike after evidence is admitted over objection. And when to move, and how often?

Even in our former practice one needed to move to strike only when:

(a) a Court admitted evidence tentatively upon promise of its offeror to connect it up, and failed to do so,

(b) a witness spoke before the objection could be promptly made.

Neither situation meets the instant case.

A reading of the pertinent segment of the record must unhesitatingly indicate that any motion to strike, even if made, would have been summarily overruled by the trial Judge. His ruling and the comments that follow show the rationale thereof, and clearly indicate how the trial Court would thereto have reacted.

No previous decision of this Court as yet has considered Rule 46. No other Court has suggested that evidence admitted over objection may not be the subject of appeal because the objector failed to move to strike out the testimony. On its face, it creates a dangerous precedent. It is diametrically opposed to the spirit of the Rule eliminating technical objections and defenses. If the requirement now suggested is proper, the petitioners had no way to know of it and should not have been penalized by this ruling or decision.

(c) Finally, the Court below isolated the problem for inspection on the merits. The Court then apparently lost sight of the fact that *it was the defendant who was asserting this defense and had the burden of proof thereon,* and without stating any legal basis whatsoever therefor, concluded there was no error in admitting the contested evidence. The learned Court below, without citing authority to the contrary, or asserting its basis for appropriate relevancy of this testimony, held our cases inapposite. They were:

Hoover v. *Reichard,* 63 Pa. Sup. Ct. 517 (1916);
Caffery v. *P. & R. Ry. Co.,* 261 Pa. 251, 104 A. 569;
Buck v. *McKeesport,* 223 Pa. 211, 72 A. 514;
Rex v. *Wiswell I. D. L. R.* 624 (Nova Scotia 1935).

We consider them very much in point. The Court, however, begged the question when it said:

> "Whatsoever may be the claim of the defendant, the complainants cannot assert that the defendant's truck and trailer were not in the accident. If it bore no evidence of collision on its truck part *and did have such evidence* on the trailer, the effect of it would be a material contradiction of the testimony of Joseph Plizak, who had the Shenko boy struck by the front of the truck while he was standing in plain sight on the street, and would confirm the testimony of the witnesses for defendant who saw no boy in the street and asserted that the front of the truck had collided with no person." (Italics supplied.)

The very question raised in this appeal is whether there was any competent evidence to prove that there were such marks on the trailer of this impact. The Court below did not in its opinion set forth any explanation or legal basis to establish the propriety of admitting this testimony. *It assumed its propriety when that very question was the question in issue.* In conclusion the Court merely reiterated that the petitioners had not objected either to the photographs or in time as to the Officer's testimony.

This problem of Federal trial practice, so simple in nature as to render its error obvious, is nevertheless so serious and basic as to place the entire scope and utility of the Law of Evidence and the protection intended by it, in jeopardy. This was prejudicial error because the record is barren of any other evidence to support the solitary factual issue raised by the respondent to avoid liability for the death of this child. It is the only possible explanation for this most extraordinary verdict.

While Rule 43 favors the reception of evidence, and captious objections must be disregarded, no one may con-

tend that there can be orderly administration of justice and judgment rendered by due process of law without abiding by the fundamental rules of the law of evidence.

Relevancy, logic and reasonableness must still be the effective factors in determining the admissibility of testimony. Otherwise verdicts rendered would be capricious, prejudiced and unjust. The search for efficiency, speed and the discarding of technical defenses and procedure have not eliminated what we have said above. To do otherwise, is to allow juries to arrive at such capricious verdicts as they did in the instant case, basing it on evidence of the character here complained of; evidence having no basis in fact, logic, law or ethics to support the issue sought here to be established.

II. The Trial Judge Did Not Rule Preliminarily on the Relevancy of the Evidence, But Passed That Exclusive Judicial Function to the Jury.

Upon objection by the petitioners, and a statement as to the ground of the objection, on the admissibility of these alleged finger marks, the trial Judge said:

> "I think I will overrule the objection and allow him to say what he saw. Of course, his answer that he saw some finger marks, *unless the jury finds* from the evidence that those are the finger marks of the deceased boy, then that would be the only way that you could consider such evidence. If you believe that they are finger marks put there by somebody else beforehand, of course, that would be no evidence." Italics supplied.)

This learned Court is respectfully asked to rule whether the Rules of Evidence were vitiated by Rule 43.

In any offer of testimony, the primary function of considering whether it is of proper probative quality, from an adequate primary source and in form to be weighed by the

jury is solely and exclusively a judicial function. The Judge *alone* must with every offer of evidence, preliminarily determine its relevancy, the competency of the witness and the form of the evidence. Having overruled an objection in favor of admissibility of the evidence, he may then pass it to the jury for its decision on its *credibility* and *weight*. The Judge did not perform his preliminary function here.

The learned trial Judge in this case specifically announced that he was putting two things up to the jury to decide:

(a) *relevancy* of the testimony,

(b) its probative value and weight.

As to (a), he said:

> "Unless the jury finds from the evidence (what the policeman said he saw) that those are the fingermarks of the boy, then that would be the only way that you (jury) could consider such evidence."

There was neither previous nor subsequent testimony offered by respondent identifying these marks as to the time, size or character that properly created a reasonable basis for jury consideration of point (b). Yet the Judge said:

> "If you (jury) believe that they are finger marks put there by somebody else beforehand, of course, that would be no evidence."

How could the Judge allow a jury to conclude that these were the marks of the deceased in the total absence of evidence so pointing in the slightest degree?

Inferentially he necessarily said:

> "If you do believe they are the marks of the deceased then you can conclude that the truck did not strike the deceased."